Supreme Court, U. S.
FILED
JUN 23 1977
MICHAEL RODAK, JR., CLERK

No. 76-1460

In the Supreme Court of the United States

OCTOBER TERM, 1976

VEGAS VIC, INC., D/B/A PIONEER CLUB, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ANNE E. LIBBIN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1460

VEGAS VIC, INC., D/B/A PIONEER CLUB, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 546 F. 2d 828. The decision and order of the National Labor Relations Board (Pet. App. B-1 to B-43) are reported at 213 NLRB 841.

JURISDICTION

On January 28, 1977, the court of appeals entered an order denying a petition for rehearing and amending its earlier opinion (Pet. App. D-1). The judgment of the court of appeals was filed on February 28, 1977 (Pet. App. E-1). The petition for a writ of certiorari was filed on April 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's refusal to bargain with a union was not based on a reasonably grounded good faith doubt that the union continued to represent a majority of its employees.[1]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 4-6.

STATEMENT

1. Petitioner operates a gambling establishment in Las Vegas, Nevada, commonly known as a "slot house" because it has only slot machines and not gambling tables (Pet. App. B-8 to B-9). Since the late 1940's, the same local union has represented petitioner's employees.[2] The most recent collective bargaining agreement between the union and petitioner was a "memorandum of understanding" dated May 13, 1970, binding petitioner to the terms of the union's 1970-1973 "bars only" collective bargaining agreement (Pet. App. B-9, B-11 to B-12), and including petitioner's change girls and booth cashiers in the bargaining unit at wage rates provided in the union's agreement with the Nevada Resort

[1]In a letter to the Clerk of this Court, dated May 2, 1977, petitioner advised that, in view of the withdrawal of the Board's inadvertent request for compliance with a provision that had not been adopted by either the Board or the court of appeals, question three in the petition (Pet. 3), discussed at Pet. 19-21, "has become moot."

[2]Local Joint Executive Board of Las Vegas, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, composed of Bartenders Union, Local 165 and Culinary Workers, Local 226 (Pet. App. B-6, B-10).

Association (Pet. App. B-12).[3] From at least mid-1971 until the July 1, 1973 expiration date of the 1970-1973 contract, petitioner made payments to the union's health and welfare fund on behalf of all its unit employees, including change girls and booth cashiers (Pet. App. B-12 to B-13, B-17, B-19).

On April 18, 1973, the union requested a meeting with petitioner to negotiate changes in the collective bargaining agreement (Pet. App. B-13). On April 26, 1973, petitioner responded that it desired to terminate the agreement. On several occasions between January 1, 1973 and July 1, 1973, petitioner expressed a desire not to have any contract whatsoever with the union (Pet. App. B-13, B-18 and n. 6), and shortly after the expiration of the contract petitioner unilaterally instituted a private insurance plan and solicited employees to withdraw from the union in order to obtain the new insurance (Pet. App. B-19). During the first week of July, petitioner threatened employees Sandra Daniel and Michael Leone with loss of their jobs if they did not obtain union withdrawal cards; and, on July 19, petitioner discharged Leone (Pet. App. B-29 to B-32, B-33 to B-35). On July 25, 1973, at a meeting arranged by a union representative, petitioner refused to enter into negotiations until a new election was held (Pet. App. B-14).

2. Based upon these facts, the Board, adopting the decision of the Administrative Law Judge in all respects here relevant,[4] held that petitioner had violated Section 8(a)(1),

[3]In May 1968, petitioner and the union reached a settlement agreement that provided that the change girls and booth cashiers would be included in the bargaining unit represented by the union and would be covered by the terms of the 1967-1970 collective bargaining agreement between the union and petitioner (Pet. App. B-10 to B-11).

[4]The Board did reject the Administrative Law Judge's finding that petitioner's April 1973 unilateral change from a sit-down to a service bar was unlawful (Pet. App. B-2 to B-3).

(3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5), by soliciting employees to withdraw from union membership, discharging employee Michael Leone because of his union adherence, unilaterally instituting a new insurance plan and soliciting employees to accept it, and insisting upon a representation election before negotiating with the union (Pet. App. B-1 to B-3, B-39).

The Board rejected contentions urged by petitioner to justify its refusal to bargain. Petitioners claimed that the union was never the majority representative since there was no agreement to include change girls and booth cashiers in the bargaining unit. The Board, however, noted that both the 1968 settlement agreement and the memorandum of understanding executed with the 1970-1973 agreement clearly stated that "change girls and booth cashiers are included in the bargaining unit" (Pet. App. B-16 to B-17). The Board further found that employee complaints regarding payment of insurance claims under the union's health and welfare plan did not furnish an adequate basis for a good faith belief that a majority of the employees was disenchanted with the union representation, and that employee statements and a petition indicating that they no longer desired to be "covered by" the union resulted from petitioner's unlawful encouragement of employee disenchantment (Pet. App. B-18 to B-20). Finally, the Board found that petitioner did not, in good faith, believe that the union had abandoned the unit, but seized upon the union's delay (from April 18 until mid-July 1973) in arranging a meeting for negotiations as an excuse to undermine the union by instituting the private insurance plan (Pet. App. B-20 to B-21).

Accordingly, the Board concluded that petitioner's refusal to bargain on July 25, 1973, without an election, was unlawful (Pet. App. B-26), and ordered petitioner to bargain with the union (Pet. App. B-39 to B-41).

3. The court of appeals enforced the Board's order, holding that substantial evidence on the record as a whole supported the Board's conclusions (Pet. App. A-1 to A-3), and that petitioner had not shown that its refusal to bargain was predicated on a reasonably grounded good faith doubt of the union's majority status (Pet. App. A-2 to A-3). The court found that the factors on which petitioner relied to support its alleged doubt were "either not supported by the record, refuted by its own actions and 25-year bargaining history, or are the type of 'speculative and subjective' information specifically rejected in *Orion Corp.* v. *NLRB*, 515 F. 2d 81, 85 (7th Cir. 1975)" (Pet. App. A-3).

ARGUMENT

The sole question presented is whether there is substantial evidence to support the Board's finding that petitioner, in refusing to bargain with the union, was not motivated by a reasonably based good faith doubt concerning the union's majority status.[6] Resolution of that issue turns solely upon the application of settled law to the particular facts of this case. Consequently, further review is not warranted. See *Universal Camera Corp.* v. *National Labor Relations Board*, 349 U.S. 474, 487.

---

[6]It is settled that an incumbent union, whether or not certified by the Board, enjoys a presumption of majority status. *E.g.*, *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104; *Terrell Machine Co.* v. *National Labor Relations Board*, 427 F. 2d 1088, 1090 (C.A. 4), certiorari denied, 398 U.S. 929. This presumption can be rebutted by evidence showing that the union has lost the support of a majority of the employees in the particular unit or by evidence that the employer had a reasonable good faith doubt of continued majority status at the time it withdrew recognition. *E.g.*, *National Labor Relations Board* v. *Crimptex, Inc.*, 517 F. 2d 501, 503 (C.A. 1); *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (C.A. 5).

In any event, the record amply supports the Board's finding. As noted, the union has represented petitioner's employees for more than 25 years. Prior to petitioner's refusal to negotiate with the union, petitioner had expressed a desire not to be under any union contract, and had solicited employees to withdraw from the union and to accept coverage under the insurance plan that it had instituted immediately upon expiration of the 1970-1973 collective bargaining agreement. These circumstances, plus the fact that the company discharged employee Leone because of his refusal to withdraw from the union,[7] fully support the Board's finding that petitioner's refusal to bargain was not motivated by a good faith doubt concerning the union's majority status.

There is no merit to petitioner's contention (Pet. 14-18) that it was required to present "clear, cogent and convincing evidence of either loss of a union's majority or good faith doubt of majority status," whereas the Board's General Counsel was permitted "to prove majority status, either by a preponderance of the evidence or by way of presumption." The amended court opinion deletes the phrase "clear, cogent, and convincing evidence" (Pet. App. C-3), and concludes instead that the factors upon which petitioner relies to establish that it entertained a bona fide doubt as to the union's majority status "are insufficient to convince us that the Board's conclusions are not supported by substantial evidence" (Pet. App. D-2).[8]

---

[7] Petitioner does not here challenge the Board's finding respecting Leone, which was sustained by the court below.

[8] *Orion Corporation* v. *National Labor Relations Board*, 515 F. 2d 81 (C.A. 7), and *Retired Persons Pharmacy* v. *National Labor Relations Board*, 519 F. 2d 486 (C.A. 2), cited by the court below (Pet. App. C-3), are not to the contrary. In *Orion*, the court, after stating that an employer's good faith doubt "must satisfy an objective test, although subjective evidence may be used to bolster the argument that such doubt existed at the relevant time," went on to find that the Board's conclusion that the company failed to meet this test "was supported by substantial evidence" (515 F. 2d at 85). Similarly, in *Retired Persons*, the court merely held that the fact that "eight of 28 employees do not support the union" does not provide "objective grounds" for believing "the majority's preference has changed, particularly when ten employees voted against the union from the very start" (519 F. 2d at 490).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ANNE E. LIBBIN,
Attorney,
National Labor Relations Board.

JUNE 1977.

DOJ-1977-06